Supreme Court, U.S.
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No. 94-778

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

DAVID GENE ELFORD,

Petitioner,

vs.

WANDA LUCILLE ELFORD,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE UNITED STATES

RESPONDENT'S BRIEF IN OPPOSITION

KENNETH W. WEBER
Counsel of Record

WEBER & GUNN
7700 N.E. 26th Avenue
Vancouver, WA 98665
(206) 574-1600
Attorney for Respondent

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I. COUNTER-STATEMENT OF THE CASE

A. Nature of the Case.

This is a case involving the interpretation of a contract. (Referred to herein by its title "Separate Agreement"). There is no significant federal issue involved despite the valiant efforts of Appellant to create one by misstating what occurred.

The case was heard by the State of Washington trial court upon disputed evidence. Pursuant to the dictates of Washington law,[1] after hearing the evidence, the trial court entered Findings of Fact and Conclusions of Law. These Findings of Fact and Conclusions of Law are attached hereto as Appendix I. Briefly, however, they are referenced for the

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[1] Washington Civil Rule 52(a)(1) provides that in "all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law."

purpose of informing the court of the nature of the case. Further, portions of the testimony before the trial court, contained in the Report of Proceedings (RP) filed with the Washington Court of Appeals, is also referenced.

1. The marriage of David and Wanda was dissolved in the Superior Court of Clark County, Washington, on September 10, 1983. (Finding of Fact 1). The Decree of Dissolution of Marriage incorporated the Separation Contract of the parties which had been prepared by their mutual attorney. (Finding of Fact 2).

2. The Separation Contract incorporated into the Decree provided for an equal division of all railroad retirement benefits. Both parties believed that they could so, with neither party being aware of the provisions of the

Railroad Retirement Act. (Finding of Fact 3).

3. At the time that the Separation Contract was signed and the Decree entered, David was suffering from a disability which entitled him to retirement benefits. However, he had not otherwise qualified for retirement, and if he recovered from the disability he would no longer be entitled to the benefits. (Finding of Fact 4). This was testified to by David's witness Ann Freres, a representative of the Railroad Retirement Board, upon cross examination by Wanda's counsel:

> "Q. Let me ask you another question. At the time that he first went on what you determined retirement, is it not a (fact) that he could have been unretired had he no longer been disabled and able to perform his duties?
>
> "A. Yes, If he recovered from his disability and returned to work, reentered

the labor market." (RP 13)

* * *

"Q. All right. Let's start again. A person who goes onto a disability status you said, as I understood you, can become unretired if their disability improves to the extent they go back to work; it that correct?

"A. That's right." (RP 14)

4. Although collecting disability benefits, David was gainfully employed at the time of the execution of the Separation Contract, at the time of the entry of the Decree of Dissolution of Marriage, and at all material times thereafter, right up to and including the execution of the disputed contract ("Separate Agreement"). Both parties believed that, if the Railroad Retirement Board learned that David was employed, he would lose his disability status and would be terminated from railroad retirement pay. In order to

continue to receive disability pay, David took steps to secrete his employment as a truck driver. He did this by use of a closed corporation. (Finding of Fact 4). Two witnesses testified to this fact.

One witness was a son of the parties, Monte Elford, who, testifying about conversations with David, (RP 61) stated that on numerous occasions during the period 1983 (the time of the execution of the Separation Agreement and the entry of the Decree) to 1985 (the time the Separate Agreement was executed):

> "(H)e said that he was not supposed to be working, receiving a paycheck while was taking his medical retirement."

Wanda Elford testified (RP 44-45) that she understood in 1983, when she signed the Separation Contract, that the disability was temporary and would terminate in less

than two years. She also testified (RP 47-48) that in 1985, when she signed the Separate Agreement, David told her that "if he was going to work for anybody where he was receiving a check or money that he would lose his pension."

5. Some of the provisions of the agreement of David and Wanda which were contained in the 1983 Separation Contract did not develop the way they had anticipated at that time. One of them was a plan to sell the family home, with Wanda living there until it was sold. When the home was sold the parties were to equally divide the proceeds. Another promised to a division of the proceeds of a lawsuit involving a mobile home. Following the Decree the parties made additional verbal agreements concerning the residence. (Findings of Fact 5, 6 and 7).

6. David became impatient with the lack of progress in selling the home. In April of 985 he caused to be prepared a document entitled "Separate Agreement". This agreement provided, in part, that Wanda's interest in the residence was sold to David for $90,000. (Finding of Fact 8). It also provided for Wanda to stay in the residence for a period not to exceed five months; for David to have immediate possession of "the barn and 40 acres"; and for relinquishment by David of an alleged interest in the mobile home and mobile home lawsuit.

7. The Separate Agreement of 1985 also contained the language which surrounds this dispute. It provided that Wanda did "relinquish any and all claim to David G. Elford's Medical Retirement". (Finding of Fact 9).

8. David contends that the purpose of the disputed language was to cause Wanda's Tier II benefits to be waived. Wanda contends that she was only waiving temporary disability payments. The trial court found, on disputed evidence (the Judge believed Wanda and found David not to be credible) that both parties discussed

> "the meaning of 'medical retirement' and both understood the term to mean the terminable disability sum . . ."

The trial court also found that neither party was aware of Tier I and Tier II benefits at the time and that

> "neither of them intended to effect any retirement benefits except the current disability sum. Both parties anticipated that the disability pay that was being received in 1985 was likely to end in the near future. Both parties anticipated that . . . (David) would be entitled to his normal retirement

> benefits up (sic) reaching age 60, which would occur on November 3, 1988."

(Finding of Fact 9). The trial court also found that Wanda did not receive any payment for a release of Tier II benefits. (Finding of Fact 10).

9. Per the terms of 45 U.S.C. subsection 231a(c), Wanda is entitled to receive one-half of the Tier II benefits unless she has waived them, pursuant to 45 U.S.C., Sec. 231j.[2] The trial court found that the "Separate Agreement" did not waive the benefits.

B. Course of the Proceedings.

David attempted to have the Superior Court of Clark County, Washington rule that the "Separate Agreement" of 1985

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[2] 45 U.S.C., Sec 231j: "Any person awarded an annuity under this Act may decline to accept all or any part of such annuity by a waiver signed and filed with the Board."

constituted a waiver of the Tier II benefits. A trial was held. The court considered the testimony of the witnesses and held that the document did not constitute a waiver.

David fired his lawyer, hired a new lawyer, and sought reconsideration by the trial court pursuant to Washington's Civil Rule 59. The trial court found that no grounds existed for reconsideration, denied the motion, and entered judgment. The Court made no award of property. The judgment is attached as Appendix II.

David then filed for review in the Court of Appeals of Washington. The Court of Appeals, acting through its Commissioner, found no merit in David's appeal to warrant the attention of the Judges to it, and dismissed it. The Commissioner's ruling is attached to the

Petition for Writ of Certiorari (A-1 to A-9). David then sought to have the Judges of the Court of Appeal overrule the Commissioner. They refused to do so, again sustaining the fact that the appeal.

Having failed in the Court of Appeals, David then took his dispute to the Washington Supreme Court. That court found no merit in his contentions either.

David now seeks to make a federal case out of a contract interpretation case by filing this Petition for a Writ of Certiorari.

II. SUMMARY OF THE ARGUMENT

A. This Case Does Not Present Any Substantial Federal Law or Constitutional Questions.

This case is simply a question of contract interpretation. The parties made a contract and later disagreed about what

they contracted to. The state court heard disputed evidence and ruled against the Appellant here. The Appellant advances three arguments, to which the following responses are made:

Argument 1.

The contention: Washington law is in conflict with the Railroad Retirement Act because it permits the existence and extent of Tier I benefits to be considered in determining the distribution of assets in a dissolution of marriage case.

The response: The trial court did not make a distribution of assets, nor did it engage any such consideration. The trial court merely interpreted a contract. The issue raised is not a "case or controversy" between these parties. Further, the Appellant did not raise this issue below.

Argument 2.

The contention: The trial court implicitly relied upon Tier I benefits in awarding one-half of the Tier II benefits to Wanda.

The response: The trial court did not award anything to Wanda. It did not implicitly rely on anything. The trial court interpreted a contract.

Argument 3.

The contention: The court did not give due deference to the Railroad Retirement Board determination or the testimony of an employee of the Board.

The response: The trial court did not interfere in any manner with the determination of the Railroad Retirement Board, which had determined that Wanda was entitled to one half of the Tier II benefits. The evidence presented by the

witness was accepted by the trial court and the testimony was totally consistent with the decision of the trial court.

III. REASONS FOR DENYING THE WRIT

A. Contrary to the Contention of Appellant, the State Court Did Not Characterize David's Railroad Retirement Act Benefits Contrary to Federal Law. Indeed, the Trial Court Only Recognized That the Parties Had Not Contracted in Respect to Tier II Benefits. By Operation of Federal Law, the Tier II Benefits Are Divided Between David and Wanda.

1. Argument "A" Advanced by Appellant is Irrelevant to This Case.

This case involved the interpretation of a contract which was drafted by David and executed by the parties. The trial court did not make a division of the property of the parties. As noted in the recitation of facts above, the parties had divided their property in 1983, more than 8 years prior to the trial court decision.

The issue advanced by David - namely the contention that Washington courts are

at odds with other state courts in respect to division of assets in a dissolution case in which a railroad pension is an asset - is not part of this case. Essentially, the Appellant seeks an advisory opinion concerning other cases involving other parties. The issue is not ripe for review here. David's request is contrary to the principle in cases such as International Longshoremen's & Warehousemen's Union, Local 37 v. Boyd, 347 U.S. 222, 74 S. Ct. 447, 98 L.Ed 650 (1954).

Further, this issue was not advanced to any court below by Appellant.

2. Contrary to Argument "B" of David, the Trial Court Did Not Implicitly Rely Upon Tier I Benefits, Nor Did it Award Any Benefits, Tier II or Otherwise, to Wanda.

For whatever reason, Appellant has misstated what occurred in the state court. The issue in the state court was not how

Tier II benefits should be divided; the issue in the state court was the interpretation of a contract. David said the contract was intended to be a relinquishment by Wanda of Tier II benefits; Wanda said she intended to relinquish her share of temporary disability payments and did not intend to permanently relinquish any other benefits. In interpreting the contract, the trial court appropriately considered the circumstances surrounding its execution.[3]

The argument in the Petition for a Writ of Certiorari at pages 27 through 31 misses the point of what the trial court was

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[3] The trial court applied Washington law concerning construction of a contract. Berg v. Hudesman, 115 Wn.2d 657, 801 P.2d 222 (1990) (as an aid to ascertaining the intent of contracting parties the court may consider extrinsic evidence of the circumstances surrounding the formation of the contract.)

doing. David was arguing that Wanda had given up her Tier II benefits in exchange for the $90,000, which was to be paid over a period of time at the rate of $450 per month. The trial court, in examining the totality of the circumstances surrounding the execution of the 1985 Separate Agreement, noted the various trade-offs between the parties. (See Item 6, on page 4 above). The quotation from the record contained in David's Petition at pages 28 and 29 is incomplete. The actual quotation reads:

> "Now, Counsel, the contract itself says -- recites what took place, and then Mr. Elford had 'drawn and for all relinquished any and all claims to half of David G. Elford's medical retirement period. This agreement is made through love and affection and a division of both parties holdings to both parties satisfaction.' The issue is what was the intent of the parties when

they signed that agreement. I think that that's this is all about. Can I enforce the contract? I think I can.

"The issue is then what do I determine the intent of the parties was in interpreting that. Mr. Elford's testimony was, and I quoted it. He said we both, talking about he and Mrs. Elford, meant the medical and regular disability. He said that we knew that one ran into the other. So he know there was a distinction period. He testified there was a distinction between medical and regular disability pension.

"Now, the issue and what I am trying to interpret what the parties intended to do by this document, Mrs. has testified and the testimony shows that the medical pension, the medical disability was not a sure thing. It is something that could have been lost if he had been discovered working or if he gained his health back. So the issue is was she giving up her claim to the pension forever or was she giving up just a claim to the medical pension.

> "I would have to say just the latter, and the reason is simple, Counsel: she was receiving $5,400 a year as far as the medical pension was concerned. $450 a month. She gave up for this exchange any rights to that for $10,500 worth of a questionable claim. The rent for $5,600. Somebody had to stay on the premises, somebody had to take care of the place. If she didn't, he did. I don't think when he gave up the rent, he was giving up much. She got $90,000 in cash over a seven year period. One-half of the property to which she was entitled to anyway. So he gave her nothing for the $5,400 a year.
>
> "So the only thing I would have to conclude from that it was not the intent of her to forego her pension rights forever but to forego any claim and any right on the questionable medical claim."

It is obvious from the above statement by the trial judge that he was dealing with a number of items in the agreements of the parties to determine whether David had paid

Wanda to relinquish her share of the Tier II benefits. He ultimately found that all David had paid to Wanda as consideration was the exact amount of her half of the real estate value, and he paid her no consideration to relinquish her Tier II benefits.

The judge interpreted a document written by David. The judge did not make a property division.

3. The Trial Court Did Give Due Deference to the Railroad Retirement Board, Again Contrary to Argument "C" Advanced by David.

The issue is misstated by David. David contends that the trial court did not give deference to the determination of the Railroad Retirement Board that David was disabled and entitled to a pension. However, that is not correct and it is not the issue in this case.

The issue is whether Wanda waived her

Tier II benefits. The Railroad Retirement Board received the Separate Agreement of 1985 from David and the other documents in the divorce proceedings. In fact, the Railroad Retirement Board held that the Separate Agreement of 1985 was not effective as a waiver. This is evident from the testimony of David's own witness from the Railroad Retirement Board, Ann Freres, answering questions asked by David's lawyer, as found in the Report of Proceedings (RP 11-12):

> "Q. How was her application handled?
>
> "A. There was no application for benefits. In May, when she brought -- when Mrs. Elford brought in the documents, they were submitted to our Bureau of Law, who acted upon those documents. Okay. Mrs. Elford is not old enough to file a claim for benefits so there was no claim taken or application made. We are talking about two different

--.

"Q. I know that. With regard to the approval or the processing by the Board counsel, do you have actual knowledge of what the determination by the Board was with the Decree?

"A. Yes, they did. They determined that the Decree awarded her one-half of that part of Mr. Elford's retirement benefit that was considered subject to community property.

"Q. And do you know what that benefit was?

"A. $150 and some odd cents. One-half of Mr. Elford's Tier II.

* * *

"Q. Did Mr. Elford show you a document that appeared this form? (this question referred to the 1985 document).

"A. Yes, he did.

"Q. And did you make any suggestions to him as to -- in regard to its import?

"A. What I said, to be

> exact, was the Railroad Retirement Board would only honor a court order."

It is obvious from the above testimony that the trial court did not make any determination about the distribution of benefits that was contrary to the decision of the Railroad Retirement Board.

Further, the trial court gave due respect to the testimony of this witness, which testimony is set forth on page 2 of this Brief in Opposition. The testimony was presented, not in respect to the legal determination of the Board, but rather to show the situation of the parties, and their understanding of the terminable nature of the pension, at the time of the execution of the various documents.

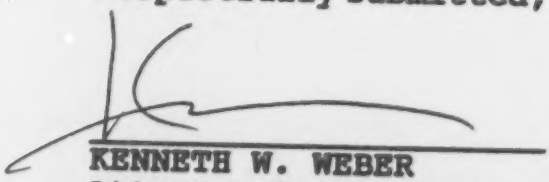
Again, this is a case involving the interpretation of a contract. David would like to boot strap it into a federal case,

but the actual facts do not support his contentions.

IV. CONCLUSION

The Petition should be denied.

Respectfully submitted,



KENNETH W. WEBER
Attorney for Respondent
Counsel of Record

APPENDIX I

Findings of Fact and
Conclusions of Law

APPENDIX II

Judgment

IN THE SUPERIOR COURT
OF CLARK COUNTY, WASHINGTON

In re the Marriage of:	)	
	)	
WANDA LUCILLE ELFORD,	)	
	)	No. 83 3 01032 0
Petitioner,	)	
	)	
and	)	FINDINGS OF FACT
	)	AND CONCLUSIONS
DAVID GENE ELFORD,	)	OF LAW
	)	
Respondent.	)	

THIS MATTER came before the Court upon a Motion for Modification of Decree of Dissolution of Marriage dated July 9, 1991. The Court treated this Motion as one under Civil Rule 60(b)(6) and set the matter for trial. The case was tried to the Court on September 16, 1991. Both parties appeared in person and with counsel. The Court heard the testimony of the parties and the witnesses, and also considered the exhibits, the original Decree of Dissolution of Marriage and the agreement incorporated into that Decree. Based upon

the evidence presented and the argument of counsel, the Court makes the following

FINDINGS OF FACT

1. The parties were previously married, with their marriage being dissolved in the above-entitled case by Decree of Dissolution of Marriage entered on September 10, 1983.

2. The Decree of Dissolution incorporated a Separation Contract dated June 8, 1983. This Separation Contract was drafted by an attorney which had been mutually employed by the parties, with neither party having truly independent counsel.

3. The Separation Contract, in paragraphs 2.1a(8) and 2.1(b)(12), made certain provisions for an equal division of the railroad retirement of the husband. Neither party fully understood the law concerning division of railroad retirement

pensions, with both parties being under the impression that they could make an equal division of all railroad retirement benefits, and that such division would be honored and implemented by the Railroad Retirement Board. In actuality, the Railroad Retirement Board would not have honored a property distribution of Tier I benefits but would have distributed Tier II benefits. Neither party submitted a copy of the Separation Contract or the Decree of Dissolution of Marriage to the Railroad Retirement Board in 1983.

4. At that time that the Separation Contract and Decree of Dissolution of Marriage were entered the Respondent was suffering from a disability that entitled him to railroad retirement benefits. However, these benefits were not permanent at that time and would have been terminated had Respondent reached a non-disability

status. At the time the Separation Contract was executed and the Decree of Dissolution was entered, and at all material times thereafter, Respondent was gainfully employed, although not by the railroad. Throughout 1983, 1984, and 1985 neither party knew whether the disability retirement would become permanent, with Respondent repeatedly expressing that he could lose his disability status (and thus, his disability retirement pay) if it was learned that he was employed and earning compensation above an allowable sum. Indeed, during this time the Respondent was employed by a corporation in which he owned all stock and was the sole officer and director. The corporation had income, but technically the corporation only paid to Respondent certain sums to reimburse him for expenses.

5. The Separation Contract,

paragraph 2.12, provided that if the family home were not sold within one year, the Respondent would receive from Petitioner rental in the sum of $350 per month. Paragraph 2.13 of the Separation Contract required both parties to equally contribute for the cost of maintenance, insurance and taxes expended on that home. In the spring of 1984 the parties verbally agreed that if Petitioner would perform certain acts of maintenance and make certain improvements to the home, the Respondent would not require her to pay the rental. The Petitioner performed and the Respondent did not request payment of the rental.

6. The Separation Contract, paragraph 2.1b(2) required Petitioner to pay to Respondent $10,500 from the proceeds of certain litigation. The litigation did not result in Petitioner receiving any proceeds.

7. The Separation Contract, paragraphs 2.1a(10) and 2.1b(1) provided for tenancy in common ownership of the family home and land, with the net proceeds to be mutually divided.

8. On April 23, 1985, Respondent approached Petitioner with an offer to pay her $90,000 in exchange for her release to him of her half-interest in the commonly owned real estate and a release of his share of the proceeds in the litigation mentioned in Finding of Fact 6 above. She agreed to this proposal. Respondent caused the preparation of a document entitled "Separation Agreement". This document was signed by the parties on April 24, 1985. Respondent paid the $90,000 to Petitioner as provided in the Separate Agreement, with the monthly payments at least initially being made from the portion of the disability pay that Petitioner was

previously receiving.

9. Page 2 of the Separate Agreement provided that Petitioner did "relinquish any and all claim to David G. Elford's Medical Retirement". Until April 24, 1985, Respondent had been paying to Petitioner one-half of the disability pay he was receiving from the Railroad Retirement Board. Both parties discussed the meaning of "medical retirement" and both understood the term to mean the terminable disability sum he was currently receiving. Neither party was aware at the time they signed this agreement of the Tier I and Tier II provisions, and neither of them intended to effect any retirement benefit except the current disability sum. Both parties anticipated that the disability pay that was being received in 1985 was likely to end in the near future. Both parties anticipated that Respondent would be

entitled to his normal retirement benefits up reaching age 60, which would occur on November 3, 1988.

10. Petitioner did not receive any payment for a release of Tier II benefits.

11. In May of 1991 Petitioner contacted the Railroad Retirement Board to learn what she needed to do to obtain her portion of the retirement benefits when she became eligible for them. In July of 1991 the Railroad Retirement Board advised her that she was entitled to receive Tier II benefits in the amount of approximately $151 per month and since that time those benefits have been paid to her directly by the Railroad Retirement Board. Prior to submission of the Separation Contract and Decree of Dissolution of Marriage to the Railroad Retirement Board in May of 1991 and the subsequent determination concerning Petitioner's entitlement to one-half of the

Tier II benefits, the Respondent had received all Tier II benefits. It was not until the July 1991 determination that Petitioner learned of the existence of Tier I and Tier Ii benefits. It was not until July of 1991 that Petitioner learned that Respondent had been receiving the Tier II benefits.

12. Respondent has not proven the facts necessary to obtain relief under Civil Rule 60(b)(6) or upon any other basis.

13. Petitioner has little in the way of liquid assets. She had to borrow funds with which to retain her attorney to represent her in this proceeding. Other that for the Tier Ii benefits that Petitioner receives she has no income. She was injured in an automobile accident earlier this year and has not been able to resume her employment. It is not known

when she will be able to resume employment. Her employment prior to the accident was on a part-time basis. Respondent has monthly income from Railroad Retirement and from real estate contracts in the range of $2,500 per month.

14. Petitioner's reasonable attorney fees incurred in this proceeding is $2,000 prior to the hearing to present these Findings. From the foregoing Findings of Fact the Court makes the following

CONCLUSIONS OF LAW

1. The 1985 Separation Agreement did not alter the right to Petitioner to receive Tier II benefits.

2. The Motion of Respondent should be dismissed with prejudice.

3. The Petitioner should be awarded judgment against Respondent for her attorney fees in the sum of $2,000.

DONE in Open Court this 25th day of October, 1991.

/s/ James D. Ladley
J U D G E

Presented by:

/s/
KENNETH W. WEBER
Of Attorneys for Petitioner
W.S.B.A. #3728

IN THE SUPERIOR COURT
OF CLARK COUNTY, WASHINGTON

In re the Marriage of:	)	
	)	
WANDA LUCILLE ELFORD,	)	
	)	No. 83 3 01032 0
Petitioner,	)	
	)	
and	)	JUDGMENT
	)	
DAVID GENE ELFORD,	)	
	)	
Respondent.	)	

JUDGMENT SUMMARY

A. Judgment creditor: Wanda Lucille Elford.

B. Judgment creditor's attorney: Kenneth Weber.

C. Judgment debtor: David George Elford.

D. Judgment debtor's attorney: Kenneth Hoffman.

E. Judgment amount: $2,000.00.

F. Interest rate on total judgment: Twelve percent (12%) per annum.

Based upon the Findings of Fact and Conclusions of Law entered herein, it is, hereby,

ORDERED, ADJUDGED AND DECREED as follows:

1. The Motion for Modification of Dissolution, dated July 9, 1991, is dismissed with prejudice.

2. Petitioner is entitled to continue to receive one half of the Tier II benefits from Respondent's Railroad retirement pension.

3. Petitioner is awarded judgment against respondent for attorney fees in the sum of $2,000.00.

DONE in Open Court this 25th day of October, 1991.

/s/ James D. Ladley
J U D G E

Presented by:

/s/
KENNETH W. WEBER
Of Attorneys for Petitioner
W.S.B.A. #3728